to property, and should therefore protect the impairment of such rights at the hands of strangers.

This should be decisive of the principal case. Moreover there is no practical reason why equity should not protect a personal obligation of this type, since it is quite as unconscientious for a third party to interfere with a personal contract as it is to interfere with a contract for the sale of land. The sole reason for distinction between the cases is in the adequacy of the legal remedy. If the inadequacy of the legal remedy under the facts of the principal case is conceded, the result reached must be considered as at least doubtful on principle, and illiberal in its practical effect.[19]

MUTUALITY AS AFFECTING SPECIFIC PERFORMANCE OF CONTRACTS RELATING TO OPTIONS.—A loose use of the term "mutuality" and a willingness on the part of the courts to adopt a rule and apply it broadcast, without analysis of the reasoning behind the rule and its applicability to the particular case at hand, has led to a quagmire of conflicting authority on the question of specific performance.

It is laid down generally that equity will not specifically enforce a contract unless there is mutuality of obligation and of remedy.[1] Yet one who has not signed the memorandum of a contract for the sale of land may have specific performance against the party who has signed.[2] Similarly a plaintiff will not be denied relief simply because he was an infant when he entered the contract;[3] and a vendor who has good title at the time of the decree will not be denied relief solely on the ground that his title was unmarketable at the time the contract was made.[4] Again, in the case of a bilateral contract performed

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[19]One questionable solution of the problem is to call every obligation a property right. See 1 Harvard Law Rev. 9.

[1]Fry, Specific Performance (3rd ed.) § 460; Pomeroy, Specific Performance (2nd ed.) §§ 162-163.

[2]Ullsperger *v.* Meyer (1905) 217 Ill. 262, 75 N. E. 482. This is true whether the plaintiff is vendor, Armstrong *v.* Maryland Coal Co. (1910) 67 W. Va. 589, 598, 69 S. E. 195, or vendee. Fox *v.* Hawkins (1912) 150 App. Div. 801, 135 N. Y. Supp. 245. The theory is that the plaintiff by filing his bill renders the obligation mutual and enables the court to protect the defendant while aiding the plaintiff. See Richards *v.* Green (1872) 23 N. J. Eq. 536. Originally, mutuality both of obligation and remedy were required as of the date of the contract and therefore relief was refused in such cases as these. Duval *v.* Myers (1850) 2 Md. Ch. 401; Houser *v.* Hobart (1912) 22 Idaho 735, 127 Pac. 997. If the contract is by parol, such part performance as would render it impossible for the parties to be put *in statu quo* will take the case out of the Statute of Frauds and enable equity to grant relief. Williams *v.* Carty (1910) 205 Mass. 396, 91 N. E. 392; Young *v.* Overbaugh (1895) 145 N. Y. 158, 39 N. E. 712 (promise of gift); *cf.* Milholland *v.* Payne (1915) 169 App. Div. 712, 155 N. Y. Supp. 773.

[3]Clayton *v.* Ashdown (1715) 9 Vin. Ab. 593 (G. 4) 2. Otherwise where the plaintiff is an infant at the time of the decree. Flight *v.* Bolland (1828) 4 Russ. 298.

[4]Jenkins *v.* Fahey (1878) 73 N. Y. 355; Gibson *v.* Brown (1905) 214 Ill. 330, 73 N. E. 578; Gerba *v.* Mitruske (1915) 84 N. J. Eq. 79, 141, 94 Atl. 34; but *cf.* Ten Eyck *v.* Manning (1893) 52 N. J. Eq. 47, 27 Atl. 900. Where time is of the essence, the vendor must have good title at the date called for by the contract. Smith *v.* Browning (1916) 171 App. Div. 278, 157 N. Y. Supp. 71.

on one side,[5] even where such performance was not compellable in equity,[6] and of a unilateral contract where there has been complete performance[7] or a mere tender and refusal,[8] equity will grant specific performance.[9] The reason for the requirement of mutuality is to insure justice.[10] Where the defendant has already received that which he was entitled to under his contract, the doctrine of mutuality has no application.[11] Where such is not the case, the mutuality essential to specific performance is merely that which will enable a court of equity, while enforcing the contract on behalf of one party, to see to it that the other party secures that to which he is entitled under the contract.[12] Of course, since the right to specific performance is

[5]Topeka Water Supply Co. *v.* Root (1895) 56 Kan. 187, 42 Pac. 715; Safford *v.* Barber (1908) 74 N. J. Eq. 352, 363, 70 Atl. 371.

[6]Moayan *v.* Moayan (1903) 114 Ky. 855, 868, 72 S. W. 33; Turley *v.* Thomas (1909) 31 Nev. 181, 200, 101 Pac. 568.

[7]Borel *v.* Mead (1884) 3 N. M. 84, 2 Pac. 222; Howe *v.* Watson (1901) 179 Mass. 30, 39, 60 N. E. 415; Howe *v.* Benedict (1913) 176 Mich. 522, 142 N. W. 768; *contra, semble* Mahaney *v.* Carr (1903) 175 N. Y. 454, 67 N. E. 903.

[8]House *v.* Jackson (1893) 24 Ore. 89, 32 Pac. 1027; Fuller *v.* Artman (1893) 69 Hun, 546, 24 N. Y. Supp. 13; Harlan *v.* Harlan (1916) 273 Ill. 155, 112 N. E. 452. In order to avoid any possible complication due to the mutuality rule, the courts tend to treat contracts as bilateral whenever possible, particularly in cases of contracts resulting from the exercise of an option. First Nat'l. Bank *v.* Corporation Securities Co. (1915) 128 Minn. 341, 150 N. W. 1084; Fox *v.* Hawkins, *supra,* note 2.

[9]A few jurisdictions, however, cling to a stringent application of the rule requiring mutuality of obligation and remedy to the extent of refusing specific performance in cases of unilateral contracts. This is generally accepted as the New York rule. Yet these same jurisdictions hold contracts of option, which are usually unilateral, to be irrevocable and enforce a bilateral contract resulting from the exercise of the option. Carney *v.* Pendleton (1910) 139 App. Div. 152, 123 N. Y. Supp. 738. Wadick *v.* Mace (1908) 191 N. Y. 1, 83 N. E. 571 and Levin *v.* Dietz (1909) 194 N. Y. 376, 87 N. E. 454, which are constantly cited as the leading authorities in New York for the proposition that equity will not grant specific performance of unilateral contracts, are really not decisions to that effect. In the former case relief was denied because of the uncertainty of the terms of the contract; in the latter case the court found that there never was any contract because the offer was never accepted. Moreover, both before and after these cases there are instances where New York courts have granted specific performance of unilateral contracts other than contracts of option. *In re* Hunter (N. Y. 1831) 1 Edw. Ch. 1; Baumann *v.* Pinckney (1890) 118 N. Y. 460, 23 N. E. 916; Farley *v.* Secor (1915) 167 App. Div. 80, 152 N. Y. Supp. 787. For general discussion of the New York rule see Dean Harlan F. Stone, The "Mutuality" Rule in New York, 16 Columbia Law Rev. 443.

[10]Turley *v.* Thomas, *supra,* note 6; Pearson *v.* Millard (1909) 150 N. C. 303, 63 S. E. 1053; Montgomery Traction Co. *v.* Montgomery L. & W. P. Co. (C. C. A. 1916) 229 Fed. 672.

[11]Turley *v.* Thomas, *supra,* note 6; First Nat'l. Bank *v.* Corporation Securities Co., *supra,* note 8; Chicago M. & St. P. R. R. *v.* United States (C. C. A. 1914) 218 Fed. 288, 301.

[12]J. I. Case Threshing Machine Co. *v.* Farnsworth (1912) 28 S. D. 432, 134 N. W. 819; *cf.* Madison Athletic Ass'n. *v.* Brittin (1900) 60 N. J. Eq. 160, 46 Atl. 652; see also Dean Harlan F. Stone, *op. cit.,* 445 and Professor James Barr Ames, Mutuality in Specific Performance, 3 Columbia Law Rev. 1, 2, 3.

not an absolute right, but is left to the sound discretion of the equity court,[13] relief may be denied because of the harsh results which would flow from the granting of specific performance,[14] or because the contract is one calling for personal services,[15] or is one, which by its very nature demands continuous performance,[16] but such denial of relief should not be confused with that which results from want of mutuality.[17]

With these fundamentals in mind, the problem of the right of a plaintiff assignee to specific performance becomes relatively simple. Where the defendant has already secured performance there is no reason for denying relief on any ground of alleged want of mutuality.[18] This is equally true where the assignee not only receives rights but undertakes obligations under the contract created by the exercise of the option.[19] Even where the assignee receives only the rights under the contract but does not undertake any obligations, there would seem to be no difficulty if the plaintiff tender the performance to which the defendant is entitled,[20] or if the assignor is joined as party defendant. The situation here is analogous to the case where, upon the death of a vendee under an executory bilateral contract for the purchase of land, the heirs of the deceased may go into equity and secure specific performance against the vendor, either upon tendering the performance to which the defendant is entitled[21] or upon joining the administrator

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[13]See Western Securities Co. *v.* Atlee (1915) 169 Iowa, 650, 151 N. W. 56; Anderson *v.* Anderson (1911) 251 Ill. 415, 96 N. E. 265.

[14]Philadelphia Ball Club Ltd. *v.* Hallman (1890) 8 Pa. C. C. 57; see Singer etc. Co. *v.* Union etc. Co. (1873) 22 Fed. Cas. No. 12904.

[15]Stanton *v.* Singleton (1894) 126 Cal. 657, 59 Pac. 146; see Ide *v.* Brown (1904) 178 N. Y. 26, 70 N. E. 101; 7 Columbia Law Rev. 204. Where the services have already been rendered, specific performance should be decreed, see note 7, *supra*; and a denial of relief can only be justified on some ground of public policy applicable to the particular case.

[16]See Clarno *v.* Grayson (1896) 30 Ore. 111, 144, 46 Pac. 426; Marble *v.* Ripley Co. (1870) 77 U. S. 339, 356.

[17]Several other classes of contracts are sometimes refused specific performance on the ground of want of mutuality:—contracts containing a stipulation that in case of breach the plaintiff shall only be liable in liquidated damages, Glass *v.* Rowe (1890) 103 Mo. 513, 539, 15 S. W. 334, especially where the provision is to secure a right to alternative performance, Davis *v.* Isenstein (1915) 257 Ill. 260, 100 N. E. 940; contracts containing an express waiver by the defendant of the right to specific performance, Heckman's Estate (1912) 236 Pa. 193, 84 Atl. 689; see Wadick *v.* Mace, *supra,* note 9; contracts allowing the plaintiff a right to terminate at pleasure, Brooklyn Ball Club Ltd. *v.* McGuire (C. C. 1902) 116 Fed. 782; *cf.* McCall *v.* Wright (1910) 198 N. Y. 143, 91 N. E. 516. As to the last class of cases, on sound theory and according to authority relief should be granted, Ames, *op. cit.,* 10 *et seq.;* 13 Columbia Law Rev. 737, 739, and if not granted, the denial should be based rather on possible harshness than on want of mutuality. Stone, *op. cit.,* 459 *et seq.* See also 9 Columbia Law Rev. 540. On principle this should apply to the other classes given.

[18]See notes 5, 6, 7, *supra.*

[19]First Nat'l. Bank *v.* Corporation Securities Co., *supra,* note 8; Pearson *v.* Millard, *supra,* note 10.

[20]Fuller *v.* Artman, *supra,* note 8; J. I. Case Threshing Machine Co. *v.* Farnsworth, *supra,* note 12; see 10 Columbia Law Rev. 574; *contra,* Genevetz *v.* Feiering (1910) 136 App. Div. 736, 121 N. Y. Supp. 392.

[21]Weidenbaum *v.* Raphael (1914) 83 N. J. Eq. 17, 90 Atl. 683.

or executor of the deceased as party defendant and praying that they be ordered to perform the obligations under the contract. The defendant thereby secures what he has bargained for; he can ask no more.

In the light of the foregoing, the question of specific performance as related to options really furnishes no exception to the rules governing specific performance of contracts in general.[22] But it is necessary in this branch of the subject to distinguish sharply between the option itself and the contract resulting from its exercise. An option is merely a promise to keep an offer open for a certain length of time.[23] If the promise is not supported by consideration, there is no contract of option but only a naked offer, revocable at the will of the offeror;[24] if the promise is supported by good consideration, there is a valid contract binding on the optionor.[25] Realizing that the commercial value of the option rests in the optionee's assurance that the offer will remain open during the contemplated period of time, equity courts have specifically enforced the optionor's promise where there was a good contract of option.[26] Where the optionee has accepted the offer within the time set by the option[27] and before any attempted withdrawal

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[22]Thomas *v.* G. B. S. Brewing Co. (1905) 102 Md. 417, 62 Atl. 633; Guyer *v.* Warren (1898) 175 Ill. 328, 51 N. E. 580; 13 Columbia Law Rev. 737. Yet the courts persist in calling it an exception, House *v.* Jackson, *supra,* note 8, presumably because they believe that relief would be impossible under the general rule.

[23]Kates *v.* McNeal (1915) 169 Cal. 697, 147 Pac. 944; Adams *v.* Peabody Coal Co. (1907) 230 Ill. 469, 82 N. E. 645; see Trogden *v.* Williams (1907) 144 N. C. 192, 56 S. E. 865. Professor Langdell seems to think that a contract of option is a conditional contract, Langdell, Equitable Conversion, 18 Harvard Law Rev. 11, 12, and his view finds some support in the cases. Bradford *v.* Foster (1888) 87 Tenn. 4, 9 S. W. 195; Ward *v.* Albertson (1914) 165 N. C. 218, 81 S. E. 168; see Houghwont *v.* Boysondau (1867) 18 N. J. Eq. 315, 318. This would seem incorrect since the consideration which the optionor is to receive for his obligation to convey is not that which is given for the option. Certainly the majority of the cases do not treat an option contract as a conditional contract. See notes 25, 26, *infra.* At least three views of the nature of the option contract have been suggested: (1) although not an executory contract for the sale of land, yet it is an executed contract for the sale of the right to buy, see Fulton *v.* Messenger (1907) 61 W. Va. 477, 56 S. E. 830; Ide *v.* Leiser, *supra,* note 2; (2) it creates an inchoate right to property and is therefore enforceable in equity, see Smith Co. *v.* Anderson (1915) 84 N. J. Eq. 681, 95 Atl. 358; (3) it is such an executory contract for the sale of property as to work an equitable conversion. See House *v.* Jackson, *supra,* note 8.

[24]Corbett *v.* Cronkhite (1909) 239 Ill. 9, 87 N. E. 874; see Wilcox *v.* Cline (1888) 70 Mich. 517, 38 N. W. 555.

[25]O'Brien *v.* Boland (1896) 166 Mass. 481, 44 N. E. 602; Black *v.* Maddox (1898) 104 Ga. 157, 30 S. E. 723; Copple *v.* Aigeltinger (1914) 167 Cal. 706, 140 Pac. 1073; *cf.* Friendly *v.* Elwert (1911) 57 Ore. 599, 105 Pac. 404, motion to set aside judgment denied, (1911) 112 Pac. 1085. As to seals, see 13 Columbia Law Rev. 1037.

[26]O'Brien *v.* Boland, *supra,* note 25; Watkins *v.* Robertson (1906) 105 Va. 269, 54 S. E. 333; see Black *v.* Maddox, *supra,* note 25. For discussion of the nature of the right secured by the optionee under an option contract, see 13 Columbia Law Rev. 737 and note 23, *supra.*

[27]Since the exercise of an option is nothing more than the acceptance of an offer and an offer must be accepted within the period set for its existence, time is of the essence in the exercise of the option. Hollman *v.* Conlon (1897) 143 Mo. 369, 378, 45 S. W. 275; Pollock *v.* Brookover (1906) 60 W. Va. 75, 53 S. E. 795, see note 4, *supra.*

of it by the offeror, the question of whether the option was a mere naked offer or a binding promise to keep the offer open should be deemed immaterial in the determination of whether or no specific performance of the new contract should be granted.[28] Such acceptance creates a new contract, either bilateral or unilateral according to the terms of the offer.[29] The specific performance of this contract should be dealt with separately, in accordance with the rules just discussed.[30]

These questions assume a new interest because of the recent New York case of *Dittenfass* v. *Horsley* (App. Div., 1st Dept., 1917, 56 N. Y. L. J. 2195) where the court, with one judge dissenting, follows the rule supposed to have been laid down by the Court of Appeals in *Levin* v. *Dietz*[31] and *Wadick* v. *Mace*.[32] The defendant and one Selznick had entered into a contract of option which in substance provided for the sale of certain stock upon the payment of a stipulated purchase price. No place for the acceptance of the option was named except in a supplementary agreement. The plaintiff, an assignee of the rights under the contract of option, attended the place named in this supplementary agreement, willing and able to perform, but the optionor did not appear. A bill for specific performance was filed, the plaintiff tendering the purchase price to the court. In denying relief, the court stated that, even if there had been a proper acceptance of the option, (a fact which the court denied) specific performance could not be granted, since there was a lack of mutuality inasmuch as the plaintiff, as assignee, had assumed no obligations under the contract. Such a statement is in conflict with the weight of authority and seems to disregard the principles explained above.

RIGHT OF CARRIER TO SUE FOR FREIGHT AFTER SURRENDER OF LIEN.—A carrier in possession of goods under authority of the owner has a lien thereon for its transportation charges,[1] but where the goods are voluntarily surrendered without payment or are not of sufficient value, when sold, to satisfy the lien, the carrier may sue for the amount of freight remaining unpaid. The cases are clear that such freight may, under various circumstances, be collected from either the consignor or the consignee,[2] but the reasons underlying the liability of each are different. The consignor is liable, and some courts hold him "*prima*

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[28]W. G. Rees Co. *v.* House (1912) 162 Cal. 740, 124 Pac. 442; Donahue *v.* Potter & George Co. (1901) 63 Neb. 128, 88 N. W. 171.

[29]Ross *v.* Parks (1890) 93 Ala. 153, 8 So. 368; Black *v.* Maddox, *supra,* note 25. The tendency of the courts has been to call the new contract bilateral. See note 8, *supra.*

[30]Wilson *v.* Seybold (D. C. 1914) 216 Fed. 975; Black *v.* Maddox, *supra,* note 25. It is to be noticed that a purchaser from the optionor, who takes with notice of the contract of option, takes subject to it. Copple *v.* Aigeltinger, *supra,* note 25.

[31]*Supra,* note 9.

[32]*Supra,* note 9.

[1]2 Hutchinson, Carriers (3rd ed.) § 864.

[2]See Central of Ga. Ry. *v.* Birmingham Sand & Brick Co. (1913) 9 Ala. App. 419, 64 So. 202; Coal & Coke Ry. *v.* Buckhannon River etc. Co. (W. Va. 1915) 87 S. E. 376.